

## INTRODUCTION

I am confronted with lawyers—both with the University and with an outside law firm which has been retained on a considerable number of occasions by the Office of General Counsel. Therefore, I have sought the assistance of a lawyer acquaintance. The following legal analysis puts forth views as a lawyer would—in the third person—but, they are my views.

## ANALYSIS

### 1. **Factual Background.**

Regent Steven Sviggum (“Sviggum”) was elected to the Board of Regents (“the Board”) one year ago, after a distinguished legislative career that included serving as Speaker of the House, until voluntarily withdrawing from leadership positions. Upon leaving the Legislature, it elected him to the Board being fully aware of his legislative background—which was certainly not viewed as an impediment.

Sviggum was recently approached by the Minnesota Senate to become the Executive Assistant to the Majority Caucus—his primary duties being that of Communications Director of that caucus. The position involves no legislative decision-making, it being strictly a full-time staff position. The job description, which was posted for public applications, involves taking “direction from the Senate Majority Leader; provide media relations and public information assistance,” and “coordinate press activity and media messages . . . including news releases, press interviews, and press statements”. This position reports to and is supervised by a superior staff employee, the Executive Director of the Rules Committee of the Senate. *See* Exhibit A, the Senate job posting.

Sviggum was keenly interested in the position because it took advantage of his vast legislative experience, yet freed him from the stress of difficult legislative decision-making that led to his decision to withdraw from the Legislature.

Sviggum saw no conflict of interest issue raised with his Regent position—none whatsoever. This is strictly a staff position, reporting to another staffer, and involving no legislative decision-making whatsoever. Yet, because of what he was advised and believed to be a spurious conflict claim raised earlier in his tenure, he proceeded much more cautiously than was suggested by the circumstance. Pursuant to the Code of Ethics of the Board, Sec. VI, subd. 3 (Exhibit B) one is “encouraged to consult with the general counsel”. Therefore, on January 11, prior to applying for the position, he met with General Counsel Mark Rotenberg and Brian Steeves, the Executive Director of the Board. Understandably, not having the position and being a public figure, he kept his specific plans confidential, but confirmed with counsel that working for the Minnesota Legislature was not violative of Board policy. Sviggum also confirmed directly that the policy is that a Regent should not run for partisan office and not be a University employee. Counsel Rotenberg responded—“Yes. Exactly”.

Shortly thereafter, on January 14, Sviggum initiated a conference call with Chair Cohen and Vice Chair Larson. Again, various employment positions were discussed, including being employed by the legislature, and response was the same as that of counsel Rotenberg to the summary statement. Board policy holds only that Regents should not run for partisan elective offices and not be a University employee—the response was “Precisely”.

During the course of both conferences, a number of possible positions were referenced, and working for the Legislature was specifically referenced in each one. Given Sviggum’s well known background, there can be no doubt but that all could easily perceive that employment with the Legislature was a real possibility.

Immediately following the above-described conferences, Regent Sviggum applied for the Executive Assistant position, and was hired. (Exhibit C)

On January 16, Executive Director Steeves, who attended the Rotenberg meeting of January 11, emailed congratulations to Sviggum and invited a consultation on “any potential COI issues that may arise”. Exhibit D. Clearly, Steeves believed that Rotenberg did not suggest any impediment to legislative employment during the January 11 conference.

Immediately thereafter, on January 18, General Counsel Rotenberg reversed course. Despite having confirmed one week earlier that legislative employment was not violative of any Board policy, and presented no conflict of interest, he wrote to Chair Cohen.

Apparently following the advice of the general counsel, Chair Cohen issued a statement that was not in accord with the previous conference she had with Sviggum. That caused an email from Senate Majority Leader Senjem on January 21 that found her statement to be “disappointing” and expressed that the Majority Leader “hoped you would have contacted me before your proclamation....” The Majority Leader also confirmed what has always been obvious from the job posting: The employment “involves no policy or finance influence or authority,” and is simply “staff support.”

Finally, on February 3, counsel Rotenberg issued a memorandum to the Board. While he purported to provide a “history” from January 16, when the Sviggum employment was announced, it conspicuously omitted any reference to his meeting with Sviggum of January 11, and that of the Chair and Vice Chair of January 14—where employment by the Legislature was specifically addressed, and no issue was raised. *See* Exhibit E.

## **2. Regent Policies.**

Contemporaneously with a letter from general counsel Rotenberg, Chair Cohen stated that the Code of Ethics does not anticipate the exact circumstance. The statement is incorrect on at least two critical points. First, it does. Second, a consideration limited to that policy alone is too restrictive and other policies must also be reviewed and considered.

### 3. The Code of Ethics.

The Code of Ethics for the Board of Regents is quite specific—it prohibits only two employments: running (and serving, we assume) in partisan public office and employment by the University. *See* Exhibit F. It has no other proscriptions, and where a policy delineates specifics, none other can be assumed. The policy gives no notice to the Regent to avoid any other employment, and therefore, one is entitled to rely upon the specific, and none other need be avoided, and it gives no notice to the legislature that any such hiring would be deemed an interference. One can cite court decisions that hold when specifics are detailed, they may not be arbitrarily expanded to condemn another circumstance.

Because employment in a staff position with the Legislature is not prohibited, it is permitted. Counsel Rotenberg correctly points out on February 3 what is obvious from the Code of Ethics—that particular issues in one’s financial interest “may impair independence of judgment.” *See Code of Ethics*, Sec. V, subd. 2. However, the memorandum of February 3 omits to reference that such a circumstance does not disqualify one from being a Regent—like running for public office or University employment.<sup>1</sup> He also omits to point out that under Section VI, subd. 1, conflicts of interest are only to be considered “on a particular matter”; that the “particular facts may indicate a potential conflict of interest is insubstantial,” and, that the University’s interests may be best served by the Regent’s participation, despite a potential conflict of interest being presented. *See* Exhibit G.

The Rotenberg memorandum of February 3 and the Chair’s statement of January 17 completely misses the point. The procedure outlined addresses something that cannot be

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<sup>1</sup> This also presupposes that the Board can prohibit one from serving as a Regent under any circumstances that is both presumptuous and dubious. It is the Legislature alone who decides who will, and will not, serve.

addressed—an entire employment other than the two that are prohibited by policy. And, no “particular” issue has ever been identified that might raise conflict of interest concerns.

Worse yet, both the February 3 memorandum and January 17 statement contains a second critical error: it fails to reference that under Section VI, subd. 1, the recusal from that particular issue is the ultimate remedy; and it is the Regent alone who determines if a potential conflict of interest is presented, and it is the Regent alone who is to “elect recusal.”

So, this entire process prescribed by the Chair upon the advice of the general counsel is thoroughly contrary, indeed contradicted by, the precise sections of the policies they cite.

#### **4. Particular Regent Employments and Past Practices.**

Regents, many being persons engaged in a variety of pursuits, have come to the Board and served despite more obvious potential and actual conflicts of interest than are presented here. Recent examples demonstrate this truth.

Steven Hunter, who recently retired from the Board, served while Secretary Treasurer and head of the AFL-CIO of Minnesota. Regent Hunter occupied the so-called “union” seat on the Board that extends back to union leader David Roe, and perhaps even before his tenure. AFL-CIO affiliated locals represent many University employees. They can and do strike, negotiate collective bargaining agreements repeatedly, have grievances, and are directly affected by the health, retirement, and other employee plans that impact Union members. Indeed, many of the issues addressed by Faculty, Staff, and Student Affairs, a major committee of the Board, directly impacts AFL-CIO members.

One might argue that with such a plethora of direct conflicts, union leaders should not serve on the Board—yet, precisely the opposite is true, and with good reason. We recognize that an employment position, even one where its very essence is a conflict with the University, can manage conflicts as they present themselves, and also benefit the institution with one’s service.

In fact, research regarding the Hunter tenure indicates certain instances where he recused himself from voting on some collective bargaining agreements and other employee related issues, but not on others. He continued to serve even during a strike. It was left to his judgment as the policy requires.

Regent Patricia Simmons is a long-time Mayo physician and has served on certain decision-making boards or committees of that institution from time to time. Of course, she relies upon Mayo financial well being for her compensation, fringe and retirement benefits, and other professional modalities. The University has Mayo relationships that present issues of financial and other issues with Mayo pertaining to contributions and distributions, as well as a healthy competition from the medical schools, research, and from the Rochester campus of the University. Various issues presented to the Board raise issues that pertain to and are adverse to Mayo. Regent Simmons and Mayo employees that preceded her on the Board were not prohibited; indeed, they are encouraged to become regents. Again, it has been and is left to the regent involved to determine if a recusal from a vote is appropriate or required. Employment does not prohibit service.

**5. Other Recent Examples of Employment Presenting Potential and Actual Conflicts for Regents.**

Regent Peter Bell served as Metropolitan Council Chair as the central corridor dispute simmered and perhaps when it exploded; school boards compete with the University for funding; major corporations have ongoing substantial financial and other relationships with the University; county boards can compete with the institution for funding and projects; students can be adversely affected by board decisions; in each of these examples and others conflict issues may arise. Policy never prohibits regent service and it is left to the individual regent to determine when recusal is appropriate.

It is unlikely that Sviggum will be presented with any issue that presents an issue where his judgment may be impaired. He can fully discharge his responsibilities as a Regent.

The job description and posting, as well as the assurance of the Senate Majority Leader confirm that there will be no legislative decision-making in the job. Sviggum is strictly a Media Director. The previous Senate communications director and his staff have never written a news release about the University of Minnesota to the knowledge of the staff. In addition, Sviggum has provided a potential conflict of interest management plan to the Senate stating that he would not be involved with any news release involving the University of Minnesota. Therefore, Sviggum will not be in any position adverse to the University in this employment.

**6. Regent Responsibilities.**

Moreover, as he serves as Regent, he will probably not be confronted with any issues that in any way impact on his employment duties or decision-making. Sviggum can fully discharge his responsibilities as a Regent. Consideration of the policy on Responsibilities of the Board and Individual Regents, Subds. 1 and 2, was omitted by the General Counsel and Chair in its writings on this issue. Subdivision 1 reveals that the Board has no responsibility pertaining to the Legislature—nor does it have any in preparing, submitting, or presenting any information or position of the institution to the Legislature. That is all done by the president, the governmental affairs officers of the University, and their extensive staffs. Simply put, the Legislature does not play any role in the responsibilities the Board is to discharge. The only possible indirect reference is to approve the annual and capital budget (subd. (d)) which will likely play a part in any appropriation request, but that is delegated to the President and the Vice Presidents to prepare and present to the Legislature—Regents only approve the budget that has been prepared.

A review of subd. 2, Individual Regent Responsibilities, leads to the same conclusion—the Regent is to refrain from any administration or management (f), and one is to recognize that

the regent has no authority—only the Board has it (e). Again, individual Regent responsibilities have not the slightest suggestion that legislative staff employment will have any impact whatever upon Sviggum discharging the individual responsibilities of a Regent.

**7. The Prior “Conflict”.**

Beginning in 2007, Sviggum was appointed to the faculty of the Humphrey Institute of Public Affairs. All compensation was donated by citizens who believed the institute and its students might benefit from his long experience and insights in public affairs. That appointment was thoroughly proper under Board policies—but, he was nonetheless confronted with a spurious conflict of interest claim. Sviggum was requested to resign the faculty position and did so with his objection noted. He did so because he was new to the Board and wished to avoid controversy at that point. Based upon the foregoing analysis, it should be clear to all that no one had authority to make that request, just as this current “inquiry” lacks policy and legal basis.

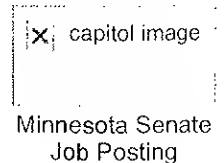
The result of the foregoing was the Board adopted policy that a regent may not be employed by the University.



**Steve Sviggum - Fwd: Job Posting - Executive Assistant to the Majority Caucus**

**From:** Wendy Dwyer  
**To:** Steve Sviggum  
**Date:** 2/17/2012 10:17 AM  
**Subject:** Fwd: Job Posting - Executive Assistant to the Majority Caucus

**Executive Assistant to the Majority Caucus**  
 (Open to Public)



**Date Posted:** 12/22/2011

**Application Deadline:** 01/13/2012

**Status:** Full-Time Regular Benefit-Eligible

**Office:** Majority Caucus

**Reports To:** Executive Director, Rules Committee

**Primary Responsibilities:**

- Act as Communications Director of Majority Caucus.
- Under the direction of the Senate Majority Leader, provide media relations and public information assistance to the Majority Caucus.
- Coordinate press activity and media messages on behalf of the Majority Leader and Majority Caucus, including news releases, press conferences and press statements.
- Resolves complex media relations issues and provides assistance to members of the caucus.
- Oversee and manage the Majority communications staff.
- Maintain daily awareness of local, state, and national government issues.

**Qualifications:**

- Media relations experience in a legislative environment desirable.
- Political astuteness and familiarity with all phases of print and electronic journalism.
- Strong organizational, problem solving and interpersonal skills.
- Strong oral and written communications skills.
- Ability to relate well with the public and deal with a variety of complex and confidential tasks.
- Ability to work long hours, including nights and weekends and meet tight deadlines.

**Application Procedure:** To apply submit : \* Resume \* Cover Letter to:

Maureen Watson  
 Leadership Assistant

75 Rev. Dr. Martin Luther King Jr. Blvd., Room 208  
 St. Paul, MN 55155-1606

maureen.watson@senate.mn

**AN EQUAL OPPORTUNITY EMPLOYER**



UNIVERSITY OF MINNESOTA  
BOARD OF REGENTS POLICY

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Board Operations

CODE OF ETHICS FOR MEMBERS OF THE  
BOARD OF REGENTS

Adopted: February 9, 1996

Amended: May 12, 2006

Supersedes: (see end of policy)

DRAFT for review December 9, 2011

**Subd. 6. Employment-Related Conflict of Interest.** An *employment-related conflict of interest* exists whenever a Regent's employment relationships may impair independence of judgment.

**SECTION VI. FINANCIAL AND EMPLOYMENT-RELATED CONFLICT OF INTEREST PROCEDURES.**

**Subd. 1. Interpretation and Application.** The conflict of interest provisions of this policy shall be interpreted and applied to best serve the interests of the University. In some cases, full disclosure and consideration of the particular facts may indicate that a potential conflict of interest is insubstantial so that the University's interests are best served by the Regent's participation. If doubt remains regarding the need for recusal, the Regent involved must elect recusal. Recusal on a particular matter because of a conflict does not reflect adversely on the Regent involved; rather, it simply recognizes that in a complex and interconnected society conflicts cannot be entirely avoided and will occur.

**Subd. 2. Disclosure or Acknowledgment of Actual or Potential Conflicts.** Actual or potential conflicts of interest shall be brought to the attention of the chair of the Board at the earliest opportunity. Such actual or potential conflicts may be reported by an individual Regent or by any other person. Disclosure or acknowledgment of such a conflict of interest and recusal shall be noted appropriately in Board minutes.

**Subd. 3. Consultation with General Counsel.** A Regent with a conflict of interest question is encouraged to consult with the general counsel who, if requested, shall provide a written opinion on whether a conflict of interest exists under this policy. A copy of any such opinion shall be provided to the chair. The chair also may request an opinion from the general counsel on any conflict of interest question.

**Subd. 4. Disputed Conflicts of Interest.** Any disputed issues relating to the existence of a conflict of interest requiring recusal shall be decided by the chair, who may choose to refer the question to an ad hoc group of Regents consisting of the chair, the vice chair, and one other Regent appointed by the chair. If the chair or vice chair is the subject of the conflict of interest dispute, another Regent shall be appointed by the ranking Regent. The chair (or the ad hoc group if appointed) shall determine whether there is a conflict of interest and report the decision to the Board; however, in all cases the Board is the final authority on conflict questions.

Maureen Watson

Exhibit C

**From:** "steve" <ssviggum@frontiernet.net>

**To:** <Maureen.watson@senate.mn>

**Date:** 1/13/2012 3:34 PM

**CC:** <wendy.dwyer@senate.mn>

→ sent 3 minutes after speaking with Chae Cohen and Vice Chae Laeson

Dear Maureen-

Good afternoon. I would like to express a sincere interest in the posted position of Executive Assistant to the Majority Caucus.

After serving in the Minnesota House of Representatives for 29 years, 8 of those as Speaker of the House, I hope to have the background, knowledge, experience, and decision making abilities to be of great value to the Majority Senate Caucus.

Thank you for your time and consideration.

Sincerely, Steve Svingum

2/24/2012



Exhibit D

Brian Steeves &lt;stee0188@umn.edu&gt;

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## New Position

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steve <ssvigum@frontiernet.net>  
To: Brian Steeves <stee0168@umn.edu>

Mon, Jan 18, 2012 at 7:42 PM

Brian-

Thanks. This came very suddenly as you would expect. Since I am not a decision-maker at the State Capitol or an elected official or a University employee I expect there will be no Conflict of Interest issues. Thanks for your service to us on the Board. Take care. Steve

----- Original Message ----- From: "Brian Steeves" <stee0168@umn.edu>

To: "Steve Sviggum" <svigg004@umn.edu>

Sent: Monday, January 16, 2012 6:17 PM

Subject: New Position

Hi Steve:

Congratulations on your new position with the Minnesota Senate. It sounds like it matches your skills well.

I'm going to send an e-mail to the Board this evening sharing the information with them.

Please feel free to call on Mark Rotenberg or I in the months ahead to discuss any potential COI issues that may arise.

Brian R. Steeves  
Acting Executive Director & Corporate Secretary  
Board of Regents  
University of Minnesota

Sent from my iPhone

Office of the General Counsel

360 McNamara Alumni Center  
200 Oak Street S.E.  
Minneapolis, MN 55455


Office: 612-624-4100  
Fax: 612-626-9624

**ATTORNEY/CLIENT COMMUNICATION  
PRIVILEGED AND CONFIDENTIAL**

February 3, 2012

**VIA EMAIL**

**TO:** Honorable Linda A. Cohen, Chair  
Honorable David M. Larson, Vice Chair  
Honorable Clyde E. Allen, Jr.  
Honorable Richard B. Beeson  
Honorable Laura Brod  
Honorable John R. Frobenius  
Honorable Venora M. Hung  
Honorable Dean E. Johnson  
Honorable David McMillan  
Honorable Maureen P. Ramirez  
Honorable Patricia S. Simmons  
Honorable Steve Sviggum

**FROM:** Mark B. Rotenberg   
General Counsel

**RE:** Process for Consideration of Employment-Related Conflict of Interest

As you are aware, on January 16, 2012 Regent Steve Sviggum announced that he had accepted employment as Communications Director and Executive Assistant for the Minnesota Senate Majority Caucus. Chair Cohen and I promptly began discussing the possibility of an employment-related conflict of interest under Board of Regents Policy: *Code of Ethics for Members of the Board of Regents*. On January 18, 2012 Chair Cohen and I issued a public statement clarifying that Regent Sviggum did not discuss his new job or consult about it with either of us prior to accepting the position.

Although the Code of Ethics does not discuss this precise circumstance, it does provide important guidance for determining the existence of conflicts, and it establishes a process for dealing with disputes. The Code of Ethics states, in part, that Regents are "expected to put aside parochial interests, keeping the welfare of the entire University, not just a particular constituency, at all times paramount." It declares that an employment-related conflict of interest exists "whenever a Regent's employment relationships may impair independence of judgment." It further provides that a Regent must resign from the Board upon announcing candidacy for any partisan elective office.

Regent Sviggum has stated publicly that he does not believe his new employment with the Senate constitutes an employment-related conflict of interest. However, under the Code of Ethics the chair has the authority to determine whether a conflict exists, and to report

Memo to Board of Regents  
February 3, 2012  
Page 2

her decision to the Board. In all cases, the Board has final authority to decide conflict questions.

After consultation with me, Chair Cohen has decided to proceed in the following manner:

- At the regular February meeting of the Board of Regents, Chair Cohen will make a statement indicating that Regent Sviggum's employment with the Minnesota Senate appears to her to constitute an employment-related conflict of interest with his duties as a Regent.
- Chair Cohen will direct me, pursuant to the Code of Ethics, Sec. VI, subd. 3, to provide a written opinion as to whether an employment-related conflict of interest exists and, if so, the degree or pervasiveness of that conflict. She will ask that this opinion be delivered to her on or before February 24, 2012.
- Chair Cohen also will direct me to engage an independent attorney to consult and render an opinion on the same issue.
- It is the Chair's intent to make this statement in the New Business portion of the full Board meeting on Friday, February 10, 2012. This follows the precedent set by former Chair Allen at the Board of Regents meeting on March 11, 2011.

Regent Sviggum has represented to Chair Cohen that he will refrain from voting at all Board and committee meetings in February to allow for a careful review of the situation.

Prior to the regular March meeting of the Board of Regents, Chair Cohen intends to review our legal opinions, make a determination, and bring forward a recommendation to the Board for its consideration. The chair has not yet decided whether she will appoint an ad hoc group of Regents to assist with these tasks, as provided in the Code of Ethics, Sec. VI, subd. 4. It is the chair's intent to call a special meeting of the Board on or before March 8, 2012 to review and act on her recommendation.

Chair Cohen has expressed gratitude for the advice she has received from her colleagues on the Board. She strongly believes that the process outlined above will allow the Board to act with independence and integrity, consistent with its Code of Ethics, in furthering the overall mission of the University.

MBR:jk

cc: Eric W. Kaler, President  
Brian Steeves, Acting Executive Director, Board of Regents



**UNIVERSITY OF MINNESOTA  
BOARD OF REGENTS POLICY**

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**Board Operations**

**CODE OF ETHICS FOR MEMBERS OF THE  
BOARD OF REGENTS**

**Adopted:** February 9, 1996

**Amended:** May 12, 2006

**Supersedes:** (see end of policy)

**DRAFT** for review December 9, 2011

**Subd. 5. Deliberations and Voting.** Regents who declare or have been found to have an actual or potential financial or employment-related conflict of interest shall recuse themselves regarding the matter determined to be a conflict and shall not take any action to influence the outcome of the matter.

**SECTION VII. CANDIDACY FOR PUBLIC OFFICE.**

A Regent shall resign from the Board upon officially announcing candidacy for any partisan elective public office.

**SECTION VIII. UNIVERSITY EMPLOYMENT.**

Notwithstanding any other provision of this policy, a Regent shall not serve as a compensated University employee, except that the Regent elected to hold the seat designated for a student may engage in student employment at the University.

**SECTION VII-IX. ANNUAL REVIEW OF POLICY.**

At the beginning of each fiscal year, the Board, with the assistance of the general counsel, shall publicly review the requirements and procedures of this policy.



# UNIVERSITY OF MINNESOTA BOARD OF REGENTS POLICY

Page 2 of 4

## Board Operations CODE OF ETHICS FOR MEMBERS OF THE BOARD OF REGENTS

Adopted: February 9, 1996

Amended: May 12, 2006

Supersedes: (see end of policy)

### SECTION IV. EXPENSES.

Regents serve without compensation, but they are entitled to reimbursement for expenses incurred while representing the University in an official capacity in accordance with guidelines on file in the Board Office.

### SECTION V. DEFINITIONS.

**Subd. 1. Recusal.** Recusal shall mean noninvolvement of a Regent in any discussion of, and decision regarding, the relevant matter to ensure that the Regent's independence of judgment is not compromised, that the public's confidence in the integrity of the Board is preserved, and that the University's public mission is protected.

**Subd. 2. Financial Conflict of Interest.** A *financial conflict of interest* exists whenever a Regent, a Regent's family member, and/or a business associated with a Regent or a Regent's family member has an actual or potential financial interest or any other interest in a matter pending before the Board that may impair independence of judgment or objectivity in the discharge of the Regent's public governance responsibilities.

**Subd. 3. Family Member.** *Family member* shall mean a spouse, parent, sibling, child, domestic partner, or any person residing in the Regent's household.

**Subd. 4. Business Associated with a Regent.** *Business associated with a Regent* shall mean an organization, corporation, partnership, proprietorship, or other entity if either the Regent or a member of the Regent's family:

- (a) receives compensation in excess of \$500 in any month or has any contractual right to future income in excess of \$6,000 per year;
- (b) serves as an officer, director, partner, or employee; or
- (c) holds a financial interest valued in excess of \$10,000.

For purposes of this policy, compensation shall not include compensation from the University, any governmental source, investment or savings income, retirement or insurance benefits, or alimony.

**Subd. 5. Financial Interest.** *Financial interest* shall mean a foreseeable, nontrivial financial effect that may result from Board action.